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AIRSPACE SOVEREIGNTY OVER CERTAIN INTERNATIONAL WATERWAYS

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THE first two Articles of the Convention of International Civil Aviation signed at Chicago in 1944 state:

ARTICLE 1—The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

ARTICLE 2—For the purpose of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.¹

These Articles are an almost exact reiteration of Article 1 of the Paris Convention of 1919, which for the first time embodied in an International Convention the theory of territorial sovereignty in the airspace. It is important to note, however, that though this is so, nevertheless it was not in 1919 that this principle was first born. Many states, including particularly Great Britain,² France and Germany had already accepted this principle of sovereignty and had embodied it in their national acts and decrees. The true position is that in 1919, the contracting States laid down in Article 1 a principle which they — as well as some non-contracting States — recognized as a basic rule of international air law. It will be noted that the two Articles of the Chicago Convention quoted above confine the area over which a state exercises sovereignty, to the airspace “above its territory.” From this reservation we may deduce the “second part” of the rule of international law, viz. that a state does not have any sovereign rights over the airspace above and land or sea which is not itself under the sovereignty of that state.³

The rule has been admirably stated by a well-known authority in this field in the following words:

¹ International Civil Aviation Conference, Chicago, Illinois, 1944. Final Act and related Documents. Washington, U.S. Government Printing Office, 1945 p. 59.

² Air Navigation Act, 1911 1 & 2 Geo. 5, c 4.

³ *Report of the Legal Sub-committee of Aeronautical Commission, Paris Conference, 1919*: “The opinion which was developed in the legal sub-committee is favorable to the full and exclusive subjection of the airspace to the sovereignty of the territory underlying it. It is only when the column of air rests upon a *res nullius* or *communis*, the sea, that freedom becomes the rule of the air. Thus the airspace shares the jurisdiction of the underlying territory. Is this territory that of an individual State? If so, the airspace is subject to the sovereignty of the State. Is it, like the high sea, free of sovereignty? Then the airspace is as free above the sea as the sea itself.”

See also: Article 12, Chicago Convention. “. . . Over the high seas, the rules in force shall be those established under this Convention. . . .”

"If any area on the surface of the earth, whether land or water, is recognized as part of the territory of a State, then the airspace over such area is also part of the territory of the same State. Conversely, if an area on the earth's surface is not part of the territory of any State, such as the water areas included in the high seas, then the airspace over such surface areas is not subject to the sovereign control of any State, and is free for the use of all States."⁴

By taking this basic rule and applying it strictly, it is possible to determine the legal status — according to accepted international law — of a very large proportion of the total airspace above the world's surface. But even in the middle of the "enlightened 20th century" interesting problems still arise about the incidence of sovereignty in the airspace above certain areas, and, especially so, over various sea or water areas. In this connection, the right to sovereign power over the two great canals of Suez and Panama, and also above the Bosphorus and Dardanelles, present situations of great interest. Strictly speaking, the position of the Suez Canal is well settled. But even although Article 8 of the Anglo-Egyptian Treaty of 1936⁵ recognizes the exclusive sovereignty of Egypt, nevertheless there does seem to be a *de facto* splitting of sovereignty over the canal and the canal zone.

The position of the Panama Canal is slightly different. No one will question the fact that the U.S. has complete and exclusive sovereignty over the surface area, but nevertheless the Republic of Panama has intimated that it is Panama and not the U.S. which has sovereignty in the airspace above this area. As these two canals represent probably the two most important waterways in the world, it will be interesting and useful to study the position in greater detail.

Taking, therefore, as our basis, the first two Articles of the Chicago Convention which enunciate the fundamental rule of international law governing the status of the airspace above the earth's surface, it is necessary to consider how the positions of the Suez and Panama Canals, the Dardanelles and Bosphorus either conform to or deviate from the normal rule.

THE SUEZ CANAL

As stated above, the status of the airspace above the Suez Canal seems to be well settled. The position was governed in the years immediately prior to the Chicago Convention by the Anglo-Egyptian Treaty of Friendship and Alliance 1936.⁶ In Article 3 of the Treaty, Egypt is recognized by the Government of the U.K. as a sovereign independent State. Article 8, which provides for the stationing of British Forces in the Canal Zone concludes with the following words:

"... The presence of these Forces shall not constitute in any manner an occupation, and will in no way prejudice the sovereign rights of Egypt."

⁴ J. C. Cooper, "Airspace Rights over the Arctic," Air Affairs, Vol. III, 1950, p. 517.

⁵ League of Nations, Treaty Series. Vol. 173, No. 4031, 1937.

⁶ League of Nations, Treaty Series. Vol. 173, No. 4031, 1937.

Thus appears in the first part of the Treaty a categorical restatement of the sovereignty of Egypt over the land areas of the Canal Zone, which of necessity extends to the airspace above. A consideration of these articles alone would leave no doubt as to the exclusive rights of Egypt to sovereignty above the Canal, but a difficulty arises immediately when one attempts to construe Paragraph 11 of the Annex. This states:

"Unless the two Governments agree to the contrary, the Egyptian Government will prohibit the passage of aircraft over the territories situated on either side of the Suez Canal and within 20 km. of it, except for the purpose of passage from East to West or vice-versa by means of a corridor 10 km. wide at Cantara. This prohibition will not however apply to the Forces of the High Contracting Parties or to genuinely Egyptian Air Organizations, or to Air Organizations genuinely belonging to any part of the British Commonwealth of Nations operating under the Authority of the Egyptian Government."

The first words of this paragraph—"Unless the two Governments agree to the contrary"—appear to be a definite incursion on the complete and exclusive sovereignty of Egypt. It seems difficult to uphold the contention that one government has complete and exclusive sovereignty, if the consent of another State is necessary before that government can allow foreign aircraft to fly over its territory. The Treaty did not merely accord to the U.K. a *privilege* of flying over the Canal Zone to the exclusion of other foreign powers, but it actually conferred a legal right to do so.⁷ Furthermore, the government of the U.K. could, as of right, object to the granting of permission by Egypt for aircraft of other states to fly over the Canal. The granting of these rights seems to constitute a distinct restriction on the full sovereignty of Egypt, and conversely they give a certain degree of sovereign power to the U.K. To use the words of a noted historian, Britain seems to have wished "to retain the substance of control while conceding the shadow of independence."⁸

It is submitted that whatever force one may ascribe to the declarations of the sovereign rights of Egypt in Article 3 and Article 8, one cannot feel that Paragraph 11 of the Annex provides a definite limitation. One is inclined to draw an analogy with the rights of a littoral state in the territorial waters adjacent to its coast. It will not be denied that the littoral state has sovereignty in those waters, but its sovereignty is limited by the right which foreign ships have to innocent passage. In the case of the airspace above the Suez Canal, however, the rights of the U.K. are even more extensive. Not only is there a right of innocent passage for British aircraft, but also a right for the British Government to prohibit Egypt from giving this right to the aircraft of other states.

The Treaty of 1936 did not, however, grant to the civil aircraft

⁷ It is submitted that this is in fact an example of the reservation by the U.K. of one of the rights which it previously had under the occupation régime prior to the 1936 Treaty.

⁸ G. M. Gathorne-Hardy: *A Short History of International Affairs, 1920-1939*. 3d Ed. Oxford University Press, p. 226.

of the U.K. a *landing* right on Egyptian territory. The practice in this respect was the usual one of requiring permission from the Egyptian Government. So it is seen that the split sovereignty" mentioned above seems to have been confined to the Canal Zone.

This state of affairs seems to have continued some time after the signing of the Chicago Convention. (The special arrangements in force during the war need not be mentioned here as they were purely temporary measures.) After the Chicago Convention came into force, however, it was obvious that this arrangement became inconsistent with the spirit of the Convention and in order to comply with the stipulation in Article 82, Egypt, with the concurrence of Great Britain designated a new prohibited area which was communicated to ICAO. This area, stated briefly, extends from the eastern bank of the Suez Canal to the Egypt-Palestine border. There is now no restricted area on the western side of the Canal. Thus the position today⁹ is that the aircraft of all contracting states now have the privilege of flying over all Egyptian territory except the prohibited area. There is now no legal prohibition against civil aircraft of contracting states on non-scheduled flights or authorized scheduled flights, from navigating over the Canal itself. But in practice, all aircraft tend to fly a certain distance to the west of the Canal because of the great difficulty in exactly delimiting the air boundry between the prohibited and non-prohibited Zone.

It seems then that Paragraph 11 of the Annex to the 1936 Treaty has lost its force, with the result that the limitation on Egyptian sovereignty in the airspace above the Suez Canal which it caused has also disappeared. It is a debatable point whether the freedom of action granted to military aircraft over the Canal is also a limitation on Egyptian sovereignty. If the concluding words of Article 8 quoted above are strictly construed then it would appear that the U.K. Government takes the view that no such limitation is intended, and so any discussion of the question would be, of necessity, merely academic.

THE PANAMA CANAL

The question as to which State has sovereign rights in the airspace above the other great Canal — the Panama Canal — has also been subject to controversy. The interested parties to this question are the Republic of Panama and the United States of America. The Canal is situated geographically within the boundries of the former State but when it was constructed, the U.S. was granted a lease of the Canal site itself and also of a zone on either side of it. This lease, contained in the Hay-Varilla Convention of 1903,¹⁰ in terms, gave to the U.S. complete sovereignty in the entire Zone.¹¹ Although Article 2 makes

⁹ This section deals with the legal position immediately prior to the recent unilateral abrogation of the 1936 Treaty by Egypt.

¹⁰ Convention between the United States and Panama for the construction of a Canal to connect the waters of the Atlantic and Pacific Oceans. Signed at Washington 18th November, 1903. A.J.I.L., Vol. 3 (Supp.) 1909.

¹¹ Art. 3 reads: The Republic of Panama grants to the United States all the rights, power and authority within the Zone mentioned and described in Article 2 of this Agreement, and within the limits of all auxiliary lands and waters men-

specific mention only of the surface area, nevertheless it has always been read by the U.S., in conjunction with Article 3, to include the grant of sovereignty in the superincumbent airspace, and they have acted according to this construction. But the Government of Panama has always opposed this contention, basing their objections on the fact that it was never intended to include sovereignty in the airspace. The attitude of the U.S. has been that, were this so, then there should have been an express reservation to that effect in the agreement itself.

Whatever the merits of these respective arguments may be, there is no question at all as to which state *in fact* exercises sovereign rights in the airspace above the Zone. The U.S. has from the very beginning issued and enforced very extensive regulations governing the whole area and the airspace above. Probably the best examples of this exercise of sovereignty may be found in the presidential Proclamations regulating and in some cases prohibiting flight by the aircraft of belligerents over the Canal in the two World Wars. Shortly after the outbreak of World War I, the President of the U.S. issued a Proclamation governing both the passage of ships through the Canal and flight over it.¹² The operative rule reads:

"Aircraft of a belligerent, public or private, are forbidden to descend or arise within the jurisdiction of the U.S. at the Canal Zone, or to pass through the airspaces above the lands and waters within the said jurisdiction."

A further proclamation with variations and additions was issued on May 13th, 1917, shortly after the entry of the U.S. into the War.¹³ Rule 13 of this proclamation uses exactly the same wording as the rule quoted above from the 1914 document with the addition of the words "other than the U.S." after the word "belligerent." These two rules leave no doubt whatsoever as to the attitude of the U.S. towards the legal status of the airspace above the Canal Zone, and it must be emphasized that these regulations were strictly enforced throughout the war, and no foreign State ever questioned the right of the U.S. to issue such regulations. They were accepted and adhered to by all belligerent States.

Similar regulations were made during World War II with the same results. An Executive Order by the President issued on September 12, 1939 after setting apart the whole Canal Zone including the territorial waters extending to three miles at each end, as a military airspace reservation, enacts in Section 2 that:

"It shall be unlawful to navigate any foreign or domestic aircraft into, within, or through the Canal Zone Military Airspace Reservation otherwise than in conformity with this Executive Order, provided however that none of the provisions of this Order shall apply to military, naval or other public aircraft of the United States."¹⁴

tioned and described in said Art. 2, *which the U. S. would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.* (Italics are mine.)

¹² Proclamation No. 1287 (1914), *Amer. Jrnl. of Intl. Law*, Vol. 9 (Suppl.).

¹³ Proclamation No. 1371, May 23, 1917, *A.J.I.L.*, Vol. 19 (Suppl.).

¹⁴ Exec. O. 8251, Sept. 12, 1939, *A.J.I.L.*, Vol. 34, Suppl. p. 32.

It is noticed that there is here no complete prohibition of flight as in the 1914 and 1917 proclamations, but even so this Order clearly demonstrates the assumption and exercise of sovereign power by the U.S.

Not only in wartime, but in peacetime also, the U.S. has always enforced very strict regulations over all flying in the area, and apart from periodic counterclaims to sovereignty by Panama, an interesting example of which is the reservation made by her delegates when signing the Chicago Convention,¹⁵ no state has questioned their legality. Thus it can be stated with conviction that the U.S. certainly enjoys *de facto* sovereignty over the Canal Zone and it is suggested that the adherence by all foreign states to the regulations made by the U.S., indicates that the generally accepted view is that it also has *de jure* sovereignty over that Zone.

THE DARDANELLES AND BOSPHORUS

Passing now from the legal status of the airspace above the two great artificial waterways, it is necessary to consider the status of airspace above the very important natural waterways of the Dardanelles, Bosphorus and the Sea of Marmora, usually known as the Straits. Since the end of World War I, the position has been governed by two Conventions — the first signed at Lausanne in 1923¹⁶ and the second signed at Montreux in 1936¹⁷ — but in order to appreciate the great change effected by these Conventions it is necessary to glance briefly at the situation before 1914. Up to the outbreak of the First World War, Turkey, as the littoral State, exercised complete sovereignty over the surface of the Straits, and no foreign shipping could pass into the Black Sea without her permission. A number of conventions had been concluded, however, and bilateral agreements had been entered into with foreign states which allowed passage for merchant shipping, but the Straits were completely closed to the warships of all non-Black Sea Powers. Russia, the only other Black Sea Power, had an agreement with Turkey which allowed passage in peacetime for stated purposes such as repair. In the same way, flight over the Straits was prohibited to foreign States. Thus it is seen that prior to World War I the Straits and the airspace above were subject to the complete sovereignty of Turkey, and it is clear that the rights flowing from this were very jealously guarded. Bearing this in mind, it is possible to appreciate the major importance of the Convention signed at Lausanne in 1923

¹⁵ "Because of its strategic position and responsibility in the protection of the means of communication in its territory, which are of the utmost importance to world trade, and vital to the defence of the Western Hemisphere, the Republic of Panama reserves the right to take, with respect to all flights through the airspace above its territory, all measures which in its judgment may be proper for its own security or the protection of said means of communication."

¹⁶ Convention on the Regime of the Straits signed at Lausanne July 24, 1923. 28 League of Nations Treaty Series, p. 115—Hudson, Intl. Leg. Vol. 2, No. 95.

¹⁷ Convention on the Regime of the Straits signed at Montreux, July 20, 1936. 173 L.O.N. Treaty Series p. 213—Hudson, Intl. Leg. Vol. 7, No. 449.

governing the future regime of the Straits, particularly so the first two Articles which read:

ARTICLE 1—The High Contracting Parties agree to recognize and declare the principle of freedom of transit and navigation by sea and by air in the Strait of the Dardanelles, the Sea of Marmora and the Bosphorus hereinafter comprised under the general term of "the Straits."

ARTICLE 2—The transit and navigation of commercial vessels and aircraft and of war vessels and of aircraft in the Straits in time of war shall henceforth be regulated by the provisions of the attached Annex.

Annex 1a. governs the passage of merchant vessels and non-military aircraft in time of peace and reads:

"Complete freedom of navigation by day and by night under any flag and with any kind of cargo, without any formalities or tax or charge whatever unless for services directly rendered, such as pilotage, light, towage or other similar charges and without prejudice to the rights exercised in this respect by the services and undertakings now operating under concessions granted by the Turkish Government. . . ."

Thus from being closed waters under the complete and exclusive sovereignty of Turkey the Straits were for the first time opened to the free transit of shipping and aircraft of all States, under the jurisdiction of an international Commission, comprised of representatives of all the signatory States including Turkey.¹⁸

The provisions of this Convention and the regulations made under it governed both sea and air navigation from 1923 until the Montreux Convention of 1936. The main principle of freedom of transit and navigation first enunciated at Lausanne was, however, not changed in 1936. In fact, it was specifically preserved and reaffirmed at Montreux. "All that was altered was the incidence of that right and the detailed conditions under which navigation and transit were to be effected."¹⁹ The International Commission relinquished its powers to the Turkish Government who undertook to guard the interests of all States according to the Convention. The structure of the Montreux document, however, differs slightly from the 1923 Convention, in that the question of air navigation is dealt with in a separate article.

"ARTICLE 23—In order to assure the passage of civil aircraft between the Mediterranean and the Black Sea, the Turkish government will indicate the air routes available for this purpose outside the forbidden zones which may be established in the Straits. Civil aircraft may use these routes provided that they give the Turkish Government as regards occasional flights a notification of three days, and as regards regular service, a general notification of the dates of passage. . . ."

The régime set up by this Convention is still in force, and all flight over the Straits is governed by the regulations made under it.

¹⁸ Great Britain, France, Italy, Japan, Bulgaria, Greece, Roumania, Russia, Jugoslavia and Turkey.

¹⁹ British Yearbook of International Law, 1937, p. 187.

Turkey, as one of the States which signed and ratified the Chicago Convention of 1944, agreed to abide by the terms and recommendations contained in that document. It is interesting to note that no action was necessary to amend Article 23 of the Montreux Convention as a result of Article 82 of the Chicago Convention because Article 23 is not inconsistent with any of the terms of the Chicago Document. The establishment of prohibited areas in the Straits — see Article 23 — is also in conformity with the provisions of Article 9 Chicago Convention. It can therefore be concluded that the present régime for air navigation above the Straits is in full accord with the general principle of air navigation accepted at Chicago in 1944. In fact the rights granted to foreign aircraft by the Montreux Convention — first established at Lausanne in 1923 — are even more liberal than those contained in the Chicago Convention. Article 5 of the Chicago Convention contains only the grant of a *privilege* of flight over the territory of a contracting State to non-scheduled air services of another contracting State. By Article 6 special authorization is necessary before similar privilege may be granted to aircraft on scheduled services. Article 23 of the Montreux Convention on the other hand gives a right — not a mere privilege — of free passage to *all* foreign aircraft and it is not confined to non-scheduled services or to aircraft of the parties to the Convention. The régime set up by the Convention has been applied by Turkey vis-à-vis the whole world, and countries not parties to either the Lausanne or the Montreux Conventions could with the passage of time be presumed to have accepted the régime in question, having made no objection to its application towards themselves. In the same way they might be regarded as having a vested interest in such benefits as the régime might entail. The Turkish Government itself recognized this and in the discussions which took place immediately prior to the drafting of the Montreux Convention the Turkish Delegation spoke of the Lausanne Convention as being something different from a treaty in the ordinary sense of the term, "that is to say, as a purely contractual arrangement between a number of States giving and receiving consideration. Rather it was to be regarded, as indeed were all the Straits Conventions, as a species of general act or statute. Its nature was less that of a contract than of a piece of statute law, which once 'passed' so to speak became law universally and not merely for those who had laid it down."²⁰ This statement strengthens the view that the Lausanne and Montreux Conventions granted rights, *stricto sensu*, of innocent passage to ships and aircraft of all the world through and over Turkish waters, which is much wider than the privilege granted in Article 5 of the Chicago Convention.

The basic rule of airspace sovereignty is borne out by the situation prevailing over the three areas under consideration. The principle enunciated in the first two articles of the Chicago Convention is not deviated from in any of these areas, although exercise of sovereign power over the Dardanelles differs in some respects from normal practice.

²⁰ British Yearbook of International Law, 1937, p. 188.